IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC., a Delaware corporation,	)	
	)	
	)	Civil Action No. 08-862-JJF/LPS
Plaintiff-Counterdefendant,	)	
	)	
v.	)	
	)	
FACEBOOK, INC., a Delaware corporation,	)	
	)	
Defendant-Counterclaimant.	)	

LEADER TECHNOLOGIES, INC.'S MOTION *IN LIMINE* NO. 6
TO EXCLUDE A PRODUCT-TO-PRODUCT COMPARISON

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I. INTRODUCTION

Leader Technologies, Inc. ("Leader") filed this action against Facebook, Inc. ("Facebook"), alleging infringement of U.S. Patent No. 7,139,761 (the "'761 Patent"). Patent infringement is fundamentally about determining the scope of asserted claims and comparing the claims to the accused product. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (citation omitted). It is error for the fact finder to consider extraneous information during this infringement analysis. *See Martin v. Barber*, 755 F.2d 1564, 1567 (Fed. Cir. 1985). Particularly problematic are product-to-product comparisons, where the accused product is compared to a commercial embodiment of the patent, rather than the claims. It appears Facebook is poised to attempt such a product-to-product comparison before the jury. Throughout the litigation Facebook has pushed for irrelevant discovery into the detailed internal workings of Leader's commercial embodiment of the '761 Patent, the Leader2Leader® product ("L2L"). Because product-to-product comparisons are irrelevant to infringement, and the possibility that the fact finder will draw an impermissible inference based on any such comparison, Facebook should be precluded at trial from directly comparing L2L with the website located at the URL, www.facebook.com ("Facebook Website").

II. STATEMENT OF FACTS

Leader alleges that Facebook infringes the '761 Patent with the architecture and operation of the Facebook Website. D.I. 1. Leader's L2L product practices the claims of the '761 Patent, and Leader has produced thousands of pages of material related to the features, design and development of L2L. Throughout this case, Facebook has taken the position that L2L is not covered by the '761 Patent. D.I. 190 at 6. The motivation for this position is two-fold: (1)

Facebook wants to be able to argue that Leader and Facebook are not competitors[1] because Leader does not practice the '761 Patent, and (2) Facebook based its false marking counterclaim on the position that L2L is not covered by the '761 Patent -- a counterclaim that Facebook added to this case as recently as December 2009. *Id.*

However, in spite of its pleading and positions taken before the Court, seven weeks after the close of discovery in this case, Facebook took the exact opposite position and supplemented it interrogatory responses to add in the defense of on-sale bar and public disclosure of the '761 Patent for the first time. D.I. 111; Declaration of Paul J. Andre in Support of Leader's Motions *In Limine* Nos. 1-7 ("Andre Decl."), ¶ 17, Ex. 16 at 3-7. The Leader product covered by the '761 Patent that Facebook alleges was offered for sale and/or publically disclosed is none other than L2L -- the very product that Facebook previously claimed was not an embodiment of the '761 Patent.

III. ARGUMENT

Patent infringement is proven by comparing the accused product to the construed asserted claims. *See Martin*, 755 F.2d at 1567. Courts have repeatedly stated that "it is error for a court to compare in its infringement analysis the accused product or process with the patentee's commercial embodiment or other version of the product or process." *Zenith Lab., Inc. v. Bristol-Myer Squibb Co.*, 19 F.3d 1418, 1423 (Fed. Cir. 1994). Facebook should be prohibited from comparing a commercial embodiment of the '761 Patent to the accused product, as it only serves to confuse the fact finder and create an impermissible inference.

Because Facebook has taken such contradictory positions regarding whether L2L is or is

[1] Despite the large amount of material produced, Facebook has moved at least three times to be given direct access to L2L and its source code. D.I. 183; D.I. 282. Facebook has premised this request on the argument that it needed access to determine if Facebook and Leader were competitors. *Id.*

not an embodiment of the claims of the '761 Patent, it appears to be on a course to make a product-to-product comparison between the Facebook Website and L2L. For its assertions regarding competition and false marking, Facebook claims that L2L ***is not*** an embodiment of the claims of the '761 Patent. See D.I. 190 at 6. For its invalidity defense related to the on-sale and public demonstration bars, Facebook argues that L2L ***is*** an embodiment of the claims. Andre Decl., ¶ 18, Ex. 17 at 3-9. These positions are mutually exclusive, as Facebook cannot have a Rule 11 basis at this stage of the case to allege both. At this time it is unclear what Facebook's ultimate position will be at trial, but it does appear likely that based on its behavior during discovery, its strategy will include a direct comparison between the Facebook Website and L2L.

Under the guise of investigating the competition between Facebook and Leader, Facebook has pushed for information related to L2L which is well beyond what was required to prove their claims. For example, Facebook was given full access to the L2L product and its source code. Any comparison between screenshots of L2L and the Facebook Website, or the source code of L2L to the source code of the Facebook Website would create an impermissible inference regarding infringement. Judge Stark recognized this when he granted access to L2L, and made clear that access was given for a narrow reason:

> "I understand the concern about this case in front of the jury not turning into a product-to-product comparison. There's only one product in the case. I believe it's only one.
>
> There's only Facebook products in the case that are alleged to have infringed. And that's what the trial will primarily be about."

Andre Decl., ¶ 20, Ex. 19 (March 12, 2010 Hearing Tr. at 74:21-75:5).

Allowing Facebook to compare L2L to the Facebook website would only serve to confuse the jury, and is an attempt to have the jury improperly rely on any real or perceived differences between the accused product and Leader's commercial embodiment, rather than

comparing the accused product to the construed asserted claims. For this reason Facebook should be prohibited from making any comparisons between L2L and the Facebook Website.

IV. CONCLUSION

Leader respectfully requests this Court exclude any attempts by Facebook to provide a product-to-product comparison of the Leader2Leader® product and the Facebook Website at trial.

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CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that on May 20, 2010, the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following; that the document was served on the following counsel as indicated; and that the document is available for viewing and downloading from CM/ECF.

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